

Robert J. Zohlmann, Esq. AZ Bar No. 019378
P.O. Box 1833, Tombstone, AZ 85638
(520) 366-7657
Attorney for DEFENDANT

IN THE MAGISTRATE COURT
TOMBSTONE, ARIZONA

STATE OF ARIZONA,

Plaintiff,

-vs-

JACK FEATHER,

Defendant.

Case No. TR2019000043

REPLY TO THE STATE'S RESPONSE
TO MOTION TO DISQUALIFY
TOMBSTONE CITY ATTORNEY
FROM PROSECUTION OF THIS CASE
AND FOR DISMISSAL OF ALL
CHARGES. CHARGES

(Evidentiary Hearing Requested)

STATE OF ARIZONA,

Plaintiff,

-vs-

STEVEN M. STALY,

Defendant.

Case No. TR20190017

Since this Court ruled from the bench that the above-captioned matters are joined for the limited purpose of consideration of said Defendants' identical motions to disqualify the City Attorney and City Prosecutor, this *Reply To The State's Response To Motion To Disqualify Tombstone City Attorney From Prosecution Of This Case And For Dismissal Of All Charge* is intended as said Defendants' joint reply to the State's identical response to each said motion.

The instant reply is based upon the original motion and memoranda, the response to Defendants' motions filed by the City Attorney, as well as the attached exhibits;

ATTACHED EXHIBITS

Exhibit A- *Articles of Incorporation, City of Tombstone*, (February 21, 1881)
[Copy of original, secured from the State Librarian].

Exhibit B-*Articles of Incorporation, City of Tombstone* [Type written version,
downloaded from the City of Tombstone website.]

Exhibit C- *Exploring Charter Government for Your City*, League of Arizona
Cities and Towns (May, 2013).

Exhibit D- *Adopting Ordinance*, Tombstone City Code (July 27, 1972).

PREFACE

In Response to the Defendant's motion, the City Attorney has enumerated, in 5 numbered paragraphs, his reasons for this Court to deny Defendant's motion to disqualify him and his contracted prosecutor from pursuing these cases. The essence of the City Attorney's response is the City's reliance upon the 1881 "charter." As is discussed below, the reliance is misplaced because the duties and powers of the Tombstone City Attorney provided for in the charter were significantly altered by the City Council in 1972. *See*, Exhibit D. If the City Attorney's reliance on the "charter" is correct and the charter is superior to the Code of Ordinances which do not rescind provisions of the charter, then he is adopting, on behalf of the City of Tombstone, the position that the city charter is in full force and effect despite the 1972 adoption of the Code of Ordinances. If such be the case, then not only the City Attorney, but the Tombstone Marshal currently are and have been acting *ultra vires* since said city officers have not been elected by the people, as required by the City Charter. Exhibit A and B, Art. 1, Section 1.

DISCUSSION

At the outset, your moving Defendants advise this Court that they stand by their original motion, citations to the City Code and Arizona Revised Statutes and the reasoning and conclusion that followed. This Reply addresses, *in seriatim*, the positions of the City of Tombstone set forth in the City Attorney's but five (5) numbered paragraphs.

In paragraph 1 of the City Attorney's responsive memorandum, the City argues pursuant to A.R.S. §9-499.01 for the proposition that Tombstone is vested with all the powers of incorporated towns as set for in title 9 of the Arizona Statutes. The City Attorney fails to inform this Court that; (1) Since Tombstone was incorporated prior to statehood, it could not have been incorporated pursuant to A.R.S. §9-101 or been assumed a city organization pursuant to A.R.S. §9-271, because that statutes had not yet been passed by the legislature at the time of the charter and (2) the Defendants' motion does not challenge the powers of the City of Tombstone nor the Magistrate's concurrent jurisdiction with the Justice of the Peace. What the Defendants do argue is that neither the City Code of Ordinances nor the County Attorney's statute authorize prosecution of criminal actions brought in the name of the "State of Arizona."

As to paragraph 2 of the City Attorney's response, the Defendants agree with that statement.

As to paragraph 3 of the City Attorney's response, the City's assertion set forth is invalid. While the quotation of the charter Article V, Section 3 is accurately stated by the City Attorney, nothing in said article and section authorizes the City Attorney to prosecute criminal cases brought in the name of the "State of Arizona" and does not otherwise authorize his prosecution of State crimes. The charter language in said section specifically authorizes the City Attorney to "****prosecute in [sic] behalf of the Mayor and Common Council of the City of Tombstone *all criminal cases of ***violation of city ordinances****." [Emphasis supplied].

Nothing in Art. V, §3 provides for the City Attorney prosecuting criminal cases other than *criminal cases of or violation of city ordinances*. *Id.* Moreover, the instant prosecutions have been not been brought in [sic] behalf of the Mayor or Common

Councils of the City of Tombstone. Accordingly, nothing contained in paragraph 3 of the City Attorney's response supports the city's argument and position.

Likewise, the City Attorney's reference to Charter Art. V, § 12 at paragraph 4 of his reply fails to support his position. Specifically, the article and section provide for prosecutions "****for the violation of any ordinance, resolution, bylaw, rule or regulation of any f the authorities of a [sic] said city, *shall be brought and prosecuted in the name of the Mayor and Common Council*****. Exhibits A and B, Art. V, §12. [Emphasis supplied]. The cited "charter" provision specifically requires that *all* prosecutions shall be brought in the name of the Mayor and Council. In order to comply with this provision, the Plaintiff in these prosecutions should be "The City of Tombstone" and not "State of Arizona."

Finally, the City Attorney, in his response to Defendants' motions, cites a 1973 case which, also, does not support his position. *See, City of Phoenix v. Coulter*, 110 ARiz. 111, 515 P.2d 856 (1973).

In the cited case, the Phoenix charter, amended in 1971, provided "The city attorney shall***prosecute in behalf of the people *all criminal cases*****" As is pointed about above and in Defendants' opening Memorandum, Tombstone has no such provision either in its Code of Ordinances or in the original 1881 Articles of Incorporation (Charter) and, therefore, the citation and inclusion of the case is in applicable to the case at bar.

CONCLUSION

The City Attorney ignored the arguments set forth in the Defendants' motion. Instead, he appears to have claimed in his response that the charter of the City of Tombstone grants to the City Attorney the authority to prosecute State crimes committed within the city limits and that he can do so in the name of the State of Arizona. If this Court accepts the city's argument, then not only the City Attorney, but the City Marshal as well, are not lawful officers of the City of Tombstone since neither has been elected, as required in the charter. If the Charter is controlling, then, the City Attorney was never properly chosen by the people and his acts of prosecution are unlawful.

If, as the Defendants have argued, the limits set forth in the Tombstone Code of Ordinances are controlling, then no authority exists for the City Attorney to prosecute crimes committed within the city limits, except city crimes (e.g., ordinance violations) .

The duty of the Cochise County Attorney is to prosecute all crimes in Superior Court and inferior courts within the County. Neither Mr. Bays nor his contract prosecutor have been designated as a Special Assistant County Attorney.

The City Attorney has not provided evidence or legal citation to support a position that the current motions should be denied. Accordingly, your Defendants urge this Court to disqualify the City Attorney and his contracted prosecutor and to dismiss the charges brought in the above-captioned matters.

Dated: September 27, 2019

Zohlmann Law Offices



Robert J. Zohlmann

Attorney for the Defendants